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332-309—69——1

CITATIONS

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 453

JOHN McMILLAN GREGG, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 8) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1968. A petition for rehearing was denied on July 26, 1968 (A. 9). The petition for a writ of certiorari was filed on Wednesday, August 28, 1968, and was granted on November 12, 1968 (A. 10). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge in this case violated the provision of Rule 32(c)(1) of the Federal Rules of Criminal Procedure to the effect that the report of a presentence investigation shall not be submitted to the court unless the defendant has been found guilty and, if so, what should be the remedy for the breach.

2. Whether Rule 32(c)(1) authorizes the making of a presentence investigation before the guilt of the defendant has been determined and, if so, whether the rule is in this respect constitutionally or otherwise infirm.

RULE INVOLVED

Rule 32 of the Federal Rules of Criminal Procedure provides in pertinent part:

(a) *Sentence.*

(1) *Imposition of Sentence.* Sentence shall be imposed without unreasonable delay. * * *

* * * * *

(c) *Presentence Investigation.*

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment

thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

* * * * * *

(e) *Probation.* After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

* * * * *

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Western District of Kentucky under an indictment charging that he had robbed the custodians of a post office and put their lives in jeopardy by the use of a dangerous weapon, in violation of 18 U.S.C. 2114. On May 31, 1967, he was sentenced to imprisonment for twenty-five years, a mandatory sentence set by the statute.

1. The evidence showed that on July 11, 1966, at about 3:30 p.m., two men, armed with guns, robbed a contract station of the post office in Louisville, Kentucky of $488.60 and twenty-one blank money orders. One of the robbers, identified at the trial as petitioner, admonished one of the two women in the station "One false move out of you, I'll blow your brains out" (Tr. 31–44). One week later, petitioner was arrested for an Indiana bank robbery at an Indianapolis motel. He was found hiding in a closet with a pistol and canvas bag containing eighteen of the money orders stolen from the postal station (Tr. 162–167).

2. At petitioner's arraignment, the government filed a psychiatric report from the Springfield Medical Cen-

ter showing that petitioner was competent to stand trial (A. 4). Petitioner had been referred to the Center by a district court in Indiana, in connection with the Indiana bank robbery indictments. The Center's report, which is part of the original record on file in this Court, details substantial adverse information regarding petitioner's character and prior record, including a confession of involvement in the Indiana offense; a copy of the report was given to defense counsel in this case prior to the arraignment.

3. The jury returned its verdict of guilty at about 3:24 p.m. (Tr. 234). The court asked if that was each juror's verdict—to which they apparently answered *en masse*—and then called petitioner forward for sentencing. The court was advised that the statute imposed a mandatory twenty-five year sentence, and correctly stated that the sentence could be varied only by probation.[1] Defense counsel then requested that petitioner be released on bond until the following Monday, to permit him a visit with his wife and family. Counsel pointed out that petitioner had "a great number of years to serve in the Federal penitentiary on the crime that he has just now been found guilty of," and that to release petitioner for a few days before he "starts serving the years and years that he has facing him in prison" would not impose a great burden on the court (A. 5-6). When the judge indicated that he would deny this request, defense counsel

[1] Where a mandatory sentence must be imposed, the sentencing judge may not specify a period after which parole may be considered under 79 U.S.C. 4208(a), (c) See Public Law 87-752, Sec. 7, 72 Stat. 847.

asked for a presentence investigation. The court then stated (A. 7):

> "* * * A pre-sentence investigation has been made. It is before me now, and I have read it. It shows a juvenile record. It shows in 1960 this defendant stole an automobile in violation of the Dyer Act and was given an indeterminate youth commitment sentence. He was paroled in 1963. He was returned—no, he was paroled in '62, returned as a parole violator in '65 and was not released full time until May of last year.
>
> I am also informed that he was convicted of armed robbery in Yuma, Arizona, and given from seven to ten years. Several warrants are now pending against him for robbery with which he is charged.
>
> It will be the judgment of this Court that this defendant be sentenced to the mandatory 25 years. Custody of the Marshal.

These brief proceedings, taking up less than five full pages of the transcript, were concluded at about 3:30 p.m. (Tr. 239).

SUMMARY OF ARGUMENT

I

The record does not indicate that the trial judge received or read the presentence report in advance of the jury's verdict. Indeed, that seems unlikely. The sentencing proceedings, although brief, were long enough to allow a quick reading of the report. The judge had only to choose between granting probation and imposing a mandatory 25-year prison

term. He already knew the circumstances of the offense and petitioner's character and record, as shown by the psychiatric report he had received earlier. Thus, it would have required very little time to determine that the probation alternative was foreclosed. Since the record does not demonstrate that both the sentencing judge and the probation officer violated their clear duty under Rule 32, it should be presumed that they did not do so.

In any event, we do not believe a hearing is required to establish whether or not the Rule was violated. As in *Calland* v. *United States*, 371 F. 2d 295, 296 (C.A. 7), certiorari denied, 388 U.S. 916, "the facts in the record * * * effectually rebut the presumption of prejudice arising from [any] violation of rule 32(c)(1)." Disclosure of the report before conviction is forbidden in order to avoid prejudicing determination of the question of guilt. We find no ruling or statement by the judge which could have apprised the jury either of any prejudgment he may have made on that question, or of any information contained in the report. Moreover, the judge had similar information before him in a psychiatric report concerning petitioner's competency—a report which did not disqualify him from conducting petitioner's trial.

II

Petitioner complains that any pretrial investigation undertaken without consent may result in a harsher sentence or unwarranted prejudice to the accused's name in the community. Because these hypothetical effects would occur without regard to when

the report was delivered to the sentencing judge and on this record petitioner was subject to neither effect, we question whether this complaint is properly before this Court. Nonetheless, we show that Rule 32(c) permits presentence investigations to be begun in advance of verdict without the accused's consent. In the first preliminary draft of the Rule, it was provided that the presentence investigation should be made after determination of the question of guilt unless the defendant or his attorney consented to an earlier beginning. This provision was deleted, however, in response to widespread criticism of imposing any limitation on the timing of presentence investigations. Perhaps as a compromise, the provision forbidding disclosure of the report's contents prior to conviction was then added. The Rule has since been interpreted to authorize presentence investigation to be begun prior to conviction. Although probation officers do endeavor to obtain an accused's consent for such investigations, as they did in this case, they are not required to do so.

Even assuming that the effects of which petitioner complains might in some cases constitute "manifest injustice," they plainly did not do so in petitioner's case. Thus, he can obtain relief only if this Court holds that these effects not only exist and could constitute such injustice, but also are so serious and intractable that pre-trial investigation could never be tolerated in the absence of consent. But petitioner does not show that these effects in fact occur, or would rise to the level of a due process deprivation. In asking both recognition for a previously undefined

right and enforcement of that right on a sweeping scale, petitioner asks too much.

ARGUMENT

I

THE RECORD DOES NOT SUGGEST THAT THE TRIAL JUDGE RECEIVED AND READ THE PRESENTENCE REPORT IN ADVANCE OF THE JURY'S VERDICT, BUT IF HE DID, THERE WOULD BE NO REASON TO SET ASIDE THE CONVICTION IN THIS CASE

A. THE RECORD DOES NOT SHOW THAT THE TRIAL COURT RECEIVED AND READ THE PRESENTENCE REPORT BEFORE VERDICT IN VIOLATION OF FED. R. CRIM. P. 32(C)(1)

Rule 32(c)(1) provides that the presentence report should not be submitted to the court until the defendant has been found guilty. On the basis of the colloquy set forth in the Statement, *supra*, petitioner asserts and the court of appeals in its decision assumed that the judge had received and read the report before the verdict of guilty.

The record does not, however, require such a conclusion. Although it shows only a brief period of time to have been involved in the sentencing proceedings, that period is greater than need have been consumed by the limited proceedings transcribed. The transcript would not indicate when the courtroom was silent, or if the probation officer had quietly handed up a document to the court, or if the court was reading it. The report may have been very short and so arranged as to be quickly digested. Moreover, in this case, the judge did not require a great period of time to glean from the report what was relevant to his sen-

tencing decision, for he had only a very limited sentencing option—probation under 18 U.S.C. 3651, or the mandatory 25-year prison term of 18 U.S.C. 2114; not even the special parole eligibility option ordinarily afforded by 18 U.S.C. 4208(a) was open in this case. See Pub. Law 87-752, Sec. 7.

Facing this simple choice between alternatives, the judge need have looked to the report only for what might eliminate one of them, petitioner's extensive and very recent prior record. It is apparent from the judge's statement, quoted at p. 7 of the Appendix and p. 5, *supra*, that he had that part of the report spread before him at that time. Moreover, the judge was not dealing with an unfamiliar subject. He had heard testimony that defendant threatened to "blow [a woman's] brains out." Defendant's character and record had been before the court in the psychiatric report relating to defendant's competence to stand trial; no one reading that report could have supposed that, in the event of conviction, immediate probation would seem a suitable disposition. The whole case stems from the fact that the judge said "I have read" the presentence report. The judge could "have read" by a glance the record with which he already had some familiarity and have known enough to make the decision that he was not going to put defendant on probation. Thus, it was not impossible for the judge to have received the probation report after verdict and then to have read enough of it to make the statement he did to counsel.

That being so, the presumption is that the trial judge discharged his official responsibility properly and did

not violate the Rule. See *Wilson* v. *United States*, 369 F. 2d 198, 200 (C.A.D.C.); *Ferrari* v. *United States*, 169 F. 2d 353 (C.A. 9); *Turberville* v. *United States*, 303 F. 2d 411, 417 (C.A.D.C.), certiorari denied, 370 U.S. 946; *Stearns Co.* v. *United States*, 291 U.S. 54, 63. The judge, who was appointed to the district court in 1954, was undoubtedly familiar with the Rule. Indeed, he had participated in the 1961 Seminar and Institute on Disparity of Sentences which petitioner cites (Pet. Br. at 9–10), at which some participating judges had suggested amending the Rule to allow pre-verdict reading of the presentence report. 30 F.R.D. 401, 408, 442. While it does not appear whether the judge supported this suggestion, he must have been aware that the Rule had not been thus amended.

The assertion that the presentence report was prematurely delivered and read also involves the assumption that the probation officer concerned was acting in violation of the Rule. Again, the presumption must be to the contrary. In addition to the Rule itself, the United States Probation Officers Manual (1962) explicitly forbids delivery of the report prior to conviction. 16.37 and Appendix A-6.10; see, also, Administrative Office of the United States Courts, *The Presentence Investigation Report* (1965), p. 4. We are informed by the United States Attorney's Office that the practice in the Western District of Kentucky is for the probation officer to wait in or near the courtroom for the jury to return its verdict and then, if a guilty verdict has been returned and a presentence report has already been prepared, personally to deliver that report to the trial judge on the bench. In

his appellate brief, Mr. Huddleston, the Assistant United States Attorney responsible for trying the case, indicated that his recollection was that the report in this case had, in fact, been delivered to the judge after the verdict was received.[2]

B. EVEN ASSUMING THAT THE REPORT WAS PREMATURELY DELIVERED AND READ, PREJUDICE NEITHER APPEARS NOR WAS POSSIBLE ON THIS RECORD, AND THERE IS THEREFORE NO REASON FOR PETITIONER'S CONVICTION TO BE SET ASIDE

If the Court finds that the presumption of regularity is overcome on this record, the ordinary remedy would be a remand to determine if in fact the trial judge saw the report before verdict. If he did, the question of remedy would arise. In the government's view, an order setting aside the conviction for new trial would be a suitable remedy only if prejudice to the jury's determination of guilt or innocence appeared or must be presumed on this record.

In *Smith* v. *United States*, 360 U.S. 1, Mr. Justice Clark and two other members of this Court characterized a private conference between a trial judge and an F.B.I. agent about a defendant's offense and background as being in the nature of a pre-sentence report

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[2] Appellee's Brief below, at pp. 9-10:

> The record does not reflect that the presentence report was obtained by the judge prior to the announcement of the verdict. But appellant asserts it anyway (Appellant's Brief, page 16). Appellee's counsel can refute this assertion only by stating that his recollection is not the same as that of defense counsel.
>
> However, in an attempt to avoid a "swearing contest," appellee cites *Calland* v. *United States*, 371 F. 259 (7th Cir. 1966), cert. denied 388 U.S. 916, to support the denial of this appeal. * * * Surely appellant is alleging no more than what was condoned in *Calland*.

governed by Rule 32. Because the conference was held before the judge determined whether or not to accept the defendant's guilty plea, they found it violative of the Rule and "presumptively prejudicial," and would have permitted the defendant to withdraw his plea and go to trial. *Id.* at 18. In *Calland* v. *United States,* 371 F. 2d 295 (C.A. 7), certiorari denied, 388 U.S. 916, however, a jury was the trier of fact and the judge had not received the presentence report until all evidence had been submitted and final arguments by counsel were about to begin. Stating that a presumption of prejudice arose from this violation of Rule 32, the court nonetheless rejected "the inference that his inadvertently premature examination of the probation report * * * in any way contributed to or influenced [the] finding [of guilt]" and held "that the facts in the record * * * effectually rebut the presumption of prejudice arising from the apparent violation of rule 32(c)(1)," citing Mr. Justice Clark's opinion in *Smith,* 371 F. 2d at 296.

The basic reason for forbidding disclosure of the contents of a probation report before conviction is that the report may contain material inadmissible on the question of guilt, see *Williams* v. *New York,* 337 U.S. 241, but which might prejudice the determination of that question if available to the trier. *Warren* v. *Richardson,* 333 F. 2d 781, 784 (C.A. 9); *United States* v. *Christakos,* 83 F. Supp. 521, 525 (N.D. Ala.), affirmed *sub nom. Woolard* v. *United States,* 178 F. 2d 84 (C.A. 5); 5 Orfield, *Criminal Procedure under the Federal Rules* (1967), § 32.35. If, then, as in *Calland,* the record shows no possibility of such prejudice occurring, any presumption of prejudice arising from

the fact of violation of the rule is overcome. This Court has stated that even constitutional error does not require a new trial where harmlessness to the determination of guilt or innocence appears beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S. 18. No more stringent standard should apply to a possible violation of the Rules with respect to premature consideration of a probation report.

In this case, lack of prejudice to the jury's determination of guilt does appear beyond a reasonable doubt. At no point in the proceedings did the trial court comment upon the evidence. Nor did he make rulings adverse to the defendant which might have been prompted by prejudice resulting from premature inspection of the report. Petitioner does not suggest how the jury might have learned of or been influenced by the judge's views.

Moreover, there is no reasonable basis for believing that premature reading of the presentence report in this case could have influenced the judge's views beyond what was properly communicated to him in the psychiatric report dealing with the question of petitioner's competency. That report thoroughly detailed petitioner's background, his sociopathic character, his recent robbery of an Indiana bank, and his prior criminal record. Once competency was put in issue, it was the court's duty to keep the material in mind, in the event petitioner's trial conduct raised new doubts. *Dusky* v. *United States,* 362 U.S. 402; *Feguer* v. *United States,* 302 F. 2d 214 (C.A. 8), certiorari denied, 371 U.S. 872. That a trial judge becomes familiar with a defendant's background—

whether from a psychiatric report, earlier trials, or trials of the defendant's confederates—neither disqualifies him from presiding at trial nor makes any of his trial rulings suspect. See *Smith* v. *United States*, 360 F. 2d 590, 592 (C.A. 5); *United States* v. *Sansone*, 319 F. 2d 586 (C.A. 2); *Cox* v. *United States*, 309 F. 2d 614 (C.A. 8); *United States* v. *Chrisos*, 291 F. 2d 535 (C.A. 7), certiorari denied, 368 U.S. 829. The ability to disregard irrelevant material in making decisions is one of the attributes that a competent judge must possess. There is thus no reason for a remand and further litigation in this case.

II

RULE 32(c) VALIDLY AUTHORIZES PRESENTENCE INVESTIGATIONS TO BE BEGUN BEFORE CONVICTION, WITH OR WITHOUT THE ACCUSED'S CONSENT

Petitioner interprets this Court's order limiting the grant of certiorari to "the questions raised in the case with respect to Rule 32(c)(1)" (emphasis added, see Pet. Br. 3) as also bringing before the Court the question whether a presentence investigation may ever be begun before verdict without the accused's consent, even though the results of that investigation are not communicated to the court until after conviction. Although petitioner's argument was mentioned in passing in the body of his petition (at p. 8), it is not readily comprised in his demand for new trial because of presumed prejudice to the determination of guilt, under *Smith* and *Calland*, *supra*, pp. 11-12, which was the basis of the petition and the decision below. The argument relies on two claims of

"prejudice": that probation officers will get a poorer view of defendants if they interview them before conviction, leading to speculatively sterner sentencing recommendations; and that if members of the accused's community are interviewed before his conviction, they will be prejudiced against him or led to believe in his guilt prematurely. Both of these forms of claimed prejudice would occur whether or not the report was timely delivered to the court; it is not shown how either could influence the determination of guilt or innocence.

Assuming the question to have been raised, petitioner can claim neither form of putative prejudice. We are informed that petitioner was not interviewed prior to his conviction; nor was there any need to do so once he was convicted,[3] given the very limited nature of the sentencing choice open to the court and the inescapable effect of petitioner's prior record and the character revealed by the psychiatric report—itself the product of recent interviews. Thus, it is unbelievable under the circumstances that petitioner's sentence was affected by the fact of a pre-conviction presentence investigation. Nor, in view of petitioner's very recent confinement and past record, is this a case where his reputation might be unfairly damaged if he became a "topic of discussion between the investigators and the subject's past employers, school officials, pastors, business associates, neighbors, relatives and creditors" (Pet. Br. 15). And, in view of the charges of

[3] We are informed that it is the practice to hold such an interview after conviction if, under the circumstances, it appears possibly helpful.

two armed robberies within months after release from confinement, there would be good reason to minimize, so far as possible, any delay in getting petitioner back into confinement if he were found guilty. Thus, treated as a matter of discretion, the early investigation without consent in this case was fully justified.

In any event, we believe that pre-conviction presentence investigations were fully considered and authorized when Rule 32 was adopted, and that the Rule in this respect does not offend the Constitution or other governing policy.

A. RULE 32(C) PERMITS PRESENTENCE INVESTIGATIONS TO BE BEGUN IN ADVANCE OF VERDICT WITHOUT THE ACCUSED'S CONSENT

In authorizing a presentence investigation, Rule 32 (c)(1) provides:

> *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

The rule thus limits the time when the report may be submitted to the court or its contents disclosed. It does not, however, impose any restriction upon the time when the probation service may commence its investigation. By implication, therefore, it permits a presentence investigation to commence prior to a verdict of guilty whether or not the defendant consents to such an investigation.

The history of the rule confirms this implication. In May 1943, proposed Rule 30(c) of the Advisory Committee's first Preliminary Draft provided:

> "*When Made.* Before the imposition of sentence or the granting of probation, save in cases where the district court otherwise directs, the probation service of the court shall make a presentence investigation and report to the court. *The presentence investigation shall be made after determination of the question of guilt unless the defendant or his attorney consents in writing that it be made earlier.*" [Advisory Committee on Rules of Criminal Procedure, Federal Rules of Criminal Procedure, Preliminary Draft (1943), p. 130; emphasis supplied.]

No restriction was placed on the court's right to examine the report if it was prepared early. Comments to the draft stated that it "continues the present practice in some districts of making the investigation after determination of the question of guilt but it also permits the continuation of the practice in others of making the investigation earlier in the proceeding if the defendant consents. The advantage of making the investigation earlier is that the probation service has ample time to investigate the case thoroughly and prepare an adequate report for the court prior to the date of sentence" (*id.* at 132–133).

After this draft was published, several district judges expressed doubt to the Advisory Committee that a defendant would consent to a presentence investigation before conviction, suggesting that such investigation should be permitted upon request of the

district judge. "The great bulk of the comments * * * objected to limitation of presentence investigation to the time after conviction," since most defendants pleaded guilty or were convicted and early investigation would prevent delay. 5 Orfield, *Criminal Procedure under the Federal Rules* (1967), § 32.2, p. 160.

The second Preliminary Draft, dated February 1944, omitted the limitation of presentence investigations before conviction to cases in which a defendant consents. Thus, proposed Rule 34 stated only that the "probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs." Comments to the draft noted that "[t]he Probation Act * * * does not specify the point in the proceedings when the presentence investigation may be made," citing state laws keyed, on the one hand, to conviction and, on the other, to indictment. Advisory Committee on Rules of Criminal Procedure, Federal Rules of Criminal Procedure, Second Preliminary Draft (1944), p. 128. Responding to the clear implication of the change, several judges commented that they opposed any investigation before conviction. Orfield, *supra*, 165–166.

The next and final draft of the Rules added the second sentence of Rule 32(c)(1), the sentence ostensibly in issue in this case: "The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty." This provision appears to be

a compromise between those who wished to be free to make an early start on presentence investigations and those who feared prejudice to the determination of guilt if the results of such investigations could be known before conviction. The subdivision was adopted as thus amended.

The Rule has consistently been treated as authorizing the initiation of presentence investigations prior to conviction. Thus, a 1957 survey showed that thirty of ninety-seven probation offices regularly began presentence investigations prior to a plea or finding of guilt, and twenty-two others stated that they occasionally did so. The Federal Probation Training Center, *Presentence Investigation Practices in the Federal Courts* (1957), p. 19; Seminar and Institute on Disparity of Sentences, 30 F.R.D. 401, 442. The differing practices are responsive to the wishes of the particular courts concerned. United States Probation Officers Manual, ¶6.12; Administrative Office of the United States Courts, *The Presentence Investigation Report* (1965), p. 4. While these materials encourage the officers concerned to seek an accused's consent for any pre-conviction investigation—as we understand petitioner's consent was sought in this case—they do not make such consent a prerequisite, and it has never been held to be so. That requirement was considered in the preliminary draft of the Rules, but rejected in subsequent versions. In the absence of compelling constitutional or other reasons for now

reading the requirement into the present rule, any change should come through formal amendment of the Rules[4] rather than litigation.

B. NEITHER CONSTITUTIONAL NOR OTHER GOVERNING PRINCIPLES REQUIRE THAT PRESENTENCE INVESTIGATIONS NEVER BE COMMENCED IN ADVANCE OF CONVICTION UNLESS THE ACCUSED CONSENTS

Petitioner claims that pretrial investigation of a presentence nature constitutes a "manifest injustice" to an accused if undertaken without his consent. In so arguing, he appears to be invoking constitutional arguments of due process, or the closely related standards which this Court evolves in supervising the administration of justice in federal courts. However, he does not make a persuasive showing even that particular cases might involve such abuse of discretion as to offend these standards; he fails entirely to show, as he must, that the harms alleged are so inevitable or otherwise intractable as to require this Court to forbid such investigations in all cases.

Petitioner bases his claim of "manifest injustice" on two factors: A hypothetical effect on the evaluation of an accused if he is interviewed before trial,

[4] Beginning in December 1962, the Advisory Committee submitted preliminary drafts of proposed amendments to the Federal Rules of Criminal Procedure to this Court. No proposed draft amendment dealing with the time that a presentence investigation could be made, or the time when it could be read by the court, was submitted. The Committee did submit and this Court adopted an amendment to Rule 32(c) which permits a court to disclose to the defense, before imposing sentence, all or any part of the material contained in the presentence investigation report.

when his principal concern is said to be with demonstrating his innocence, and a hypothetical effect on an accused's reputation in the community, if his acquaintances are interviewed in a manner suggesting his guilt before guilt is established. But petitioner offers no hard evidence that in fact these effects occur; nor does he cite prior cases or other materials suggesting that they rise to the level of a deprivation of due process, even in particular cases.

Both factors are readily controlled by the conscientious probation officer or judge. Thus, the investigating officers will quickly learn to discount any hostile or suspicious attitude which he encounters before trial. Probation officers are cautioned to conduct pretrial inquiries "in a way that cannot prejudice the defendant in the trial" and urged to seek the defendant's understanding. United States Probation Officers Manual, *supra*, ¶ 6.12. In cases where it seems important to do so, the interview can be postponed until the verdict is in. Moreover, the timing of the investigation will be evident to the court and to counsel at the sentencing proceedings; the question can be raised at that time and further interviews held if it seems useful. Finally, the investigating officer can tell any members of the defendant's community he speaks to before trial that the question of guilt has not yet been settled.

> The primary objective of the presentence report is to focus light on the character and personality of the defendant, to offer insight into his problems and needs, to help understand the

> world in which he lives, to learn about his relationships with people, and to discover those salient factors that underlie his specific offense and his conduct in general. It is not the purpose of the report to demonstrate the guilt or the innocence of the defendant. [*The Presentence Investigation Report, supra,* p. 1.]

It is entirely consistent with this objective to be frank about the posture of a pending case; petitioner has not shown that probation officers behave otherwise, individually or generally, in carrying out their duties.

But even assuming that in some cases there might be an abuse of discretion warranting some measure of relief, it is plain for the reasons already stated that no such abuse occurred in petitioner's case. Thus, petitioner must argue that in *no* case should a presentence investigation be authorized in advance of conviction without the accused's consent, that a prophylactic rule is required to avoid those cases in which the claimed effects would occur. But this argument supposes not only that these effects occur and are intolerable, but also that they could not be avoided by some less sweeping measure. In the past, this Court has approached prophylactic measures slowly, after the accrual of what it has found to be weighty evidence that lesser measures will not suffice to protect the rights concerned. *E.g., Mapp* v. *Ohio,* 367 U.S. 643; *Miranda* v. *Arizona,* 384 U.S. 436. Petitioner here asks in one breath the recognition of a previously unrecognized "right" and the enforcement of that right on a sweeping scale. He is asking too much.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted.

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